APPENDIX A

Barratry or Seizure?

MEMBERS of the British marine insurance market will be interested in a judgment awarded in the District Court of the United States regarding the loss of seven cargo ships to the Chinese Communists in 1950. The facts of this case were that, when the Chinese Government fell, the masters and crews of six ships refused orders of the China Merchants' Company (which was operating the vessels on behalf of the Nationalist Government of China) to return to Formosa and handed the vessels over to the Communists; in the case of the seventh vessel, the crew seized the ship from her master and took her to Singapore. The Government of Nationalist China, the United States Government (which held substantial mortgages on the ships) and the China Merchants' Company sued an American insurance Company for the ships which were lost. The District Judge ruled that the insurer was liable for the amount claimed in respect of the six vessels handed to the Communists because the insurance policies covered "barratrous acts"—which, he said, occurred when the officers and men of the ships acted against the interests of the owners. As regards the seventh ship, the acts committed, said the Judge, were of "seizure," and were not covered by the insurance policies on the vessel; consequently, the claim for the loss of this vessel was excluded from his award.

English Law

THE decision in respect of this seventh vessel will, no doubt, give rise to a great deal of comment in marine insurance circles in this country as the question must inevitably arise whether a similar ruling would have been given by an English Court. It is well established in English law that, if a ship is violently carried out of her course and

fraudulently run away with by the captain and crew, this is a clear case of "barratry" from the moment the ship is so carried out of her course. (Falkner *v.* Ritchie [1814]; Brown *v.* Smith [1813]; Dixon *v.* Reid [1822]). It can be assumed, therefore, that, in respect of the six vessels referred to above, a claim for loss by barratry would be upheld. In the case of the seventh ship, however, the position is somewhat more nebulous. There have not been many decisions as to what would amount to "barratry by the mariners." Section 848 of *Arnould on Marine Insurance* advances the view that, if the captain is compelled by the mutinous violence of the crew to deviate from his course, though in the teeth of express instructions to the contrary, this will not be "barratry of the master" but "barratry of the mariners" (Elton *v.* Brogden [1747]). *Arnould* goes on to say that, where the crew overpower the captain or constrain him to consent to their proceedings, the same acts would be barratry in them as in the master.

Barratry Implied in "Arnould"

The Rules for Construction of the Policy, which are embodied in the First Schedule to the Marine Insurance Act, 1906, give a definition of barratry which is not very helpful in the circumstances of the case under discussion. These Rules declare that "barratry includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer." So far as the risk of "seizure" is concerned, it was held by Lord Fitzgerald in the famous case of Cory *v.* Burr (1883) that "seizure may reasonably be interpreted to embrace every act of taking forcible possession, either by a lawful authority or by overpowering force." Full details of the "seizure" of the vessel referred to above are not yet available in this country, but from the facts which have already been reported there seems to be sufficient indication that, should a similar case be heard in the English Courts, a Judge would rule that a "barratrous" loss had occurred. It would

appear from the judgment which has been issued by the U.S. District Court that, in order to substantiate a claim for barratry it must be proved that the master contributed to or participated in the wrongful act, whereas it is clearly implied in *Arnould* that a loss of the nature in question would be held to be "barratry of the mariners" and therefore recoverable under the terms of the policy concerned

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MARINE INSURANCE

Barratry

(From our Marine Correspondent)

It is reported that a District Court Judge in the United States has recently decided that the seizure of a vessel by her crew amounts to "seizure" within the meaning of the policy and is therefore an excluded risk under the Free of Capture and Seizure Clause. Until the full judgment is available it may be unwise to jump to conclusions, but from the facts of the case one would have thought that the loss would have been clearly a case of "barratry of the master and mariner," and thus recoverable under the standard form of policy as a loss by *barratry* notwithstanding the F.C. and S. exclusions.

Shortly, it appears that after the Chinese Government fell in 1950, the masters and crews of six vessels defected by handing over the ships to the Communists instead of returning to Formosa in accordance with the instructions of the operating managers. In respect of these six vessels, the District Court Judge agreed that their loss was due to the barratrous acts of the officers and men who had acted against the interests of the owners; in these circumstances, he held that the loss was covered by the policy. In the case of a seventh vessel, however, where the crew seized the

ship from her master and took her to Singapore, the Judge ruled that the loss was due to seizure and was not covered by the policy.

This ruling will undoubtedly provoke considerable comment in this market for, as a correspondent to "Lloyd's List and Shipping Gazette" has declared, barratry as a named peril in a marine policy has never before been qualified by its origin. It is defined in the Rules for Construction of Policy annexed to the Marine Insurance Act, 1906, as including "every wrongful act wilfully committed by the master or crew to the prejudice of the owner or, as the case may be, the charterer," while according to Arnould:—

> "Barratry of masters and mariners being one of the perils insured against, the first question is as to the meaning attached to the word 'barratry.' Guided by the etymology of the word, which seems ultimately to have been derived from the Catalan *barat*, and proximately from the Italian *barratria*, in both of which languages it conveyed the notion of fraud or trick, our Judges for a long time seem to have considered that fraud, or criminal knavery, on the part of the master as against the owners with a view to benefiting himself at their expense was an essential ingredient in barratry as insured against in English policies.
>
> "Lord Ellenborough, however, in an elaborate decision, reviewing all the authorities, established the position that trick or knavery in t' e sense of an imposition practised upon the owners by the master, with a view to promoting his own benefit at their expense, was not essential to constitute barratry in our law; but that any wilful act of known criminality or gross malversation, even though not intended for the owners' prejudice, nay, even though intended for their benefit, would yet, if in fact it operated to their prejudice, by causing the loss or seizure of the ship, be barratry in the master."

To the best of my knowledge, the last case of barratry considered in our Courts was *Marstrand Fishing Co.* v. *Beer* (56 Ll. L. Rep. 163). In that case, the master of a fishing vessel, instructed to fish in the North Sea until a specified date, took her into the South Atlantic. No news of the vessel having been received for six weeks, the owners tendered notice of abandonment to underwriters and claimed a constructive total loss. Subsequently, the vessel arrived off Georgetown, British Guiana, and was arrested. Here, the only question was whether the ship was a constructive total loss, at the time abandonment was declined, within the meaning of the Marine Insurance Act, 1906, there being complete agreement that if, on the balance of probabilities at the material time the vessel was more likely to be lost than recovered, the assured would be entitled to recover the loss as a loss by barratry. In the result, it was the underwriters who gained the day, Porter, J., holding that it could not be said that at the material time the vessel was more likely to be lost than recovered.

The old case of *Cory* v. *Burr* (1883) should not be overlooked, either. Here, a ship was insured under a time policy in the usual form (including the risk of barratry) and was "warranted free from capture and seizure, and the consequences of any attempt thereat." In consequence of smuggling by the master, which amounted to barratry, the ship was seized and detained by Spanish revenue officers. In an action on the policy to recover expenses incurred by the owner to obtain the release of his vessel, it was held that the *proximate* cause of the loss was *seizure* and not the barratry of the master, and that therefore the underwriter was exempted from liability by the warranty.

It seems to me that one ought to discriminate between seizure by the master and members of the crew and seizure by other parties whose acts to the prejudice of the shipowner can in no circumstances constitute "barratry." After all, the assured is entitled to bring a claim against under-

writers under any head he may think fit, and since barratry is a named peril, and includes seizure by the master or crew, surely that ought to be sufficient.

The Post Magazine & Insurance Monitor July 25, 1957

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MARINE INSURANCE

Barratry and Seizure

(From our Marine Correspondent)

In my Notes of 13-6-57 I drew attention to a recent decision of the United States District Court in which the seizure of a vessel by her crew, though amounting to barratry, was held nevertheless to be a loss by *seizure* and therefore excluded from the policy by the provisions of the Free of Capture and Seizure Clause. Commenting upon this judgment, I expressed the view that one ought to discriminate between seizure by the master and members of the crew and seizure by other parties whose acts to the prejudice of the shipowner could in no circumstances constitute "barratry." It seemed to me that the loss was recoverable as a loss by *barratry* notwithstanding the F. C. and S. Clause exclusions, barratry being expressly mentioned as an insured peril.

Interesting Letter from New York

These comments have brought forth a most interesting letter from Mr. Oscar Houston, senior partner in Messers. Bigham, Englar, Jones & Houston, counsellors-at-law, New York, in which he takes me severely to task for the views I expressed. It had never occurred to him, he says, that anyone would doubt that it was the purpose and effect of the F. C. & S. Clause (or any other clause excluding seizures) to exclude all seizures. In his opinion, the F. C. & S.

Clause has no purpose except to exclude losses otherwise within the named perils. Continuing, Mr. Houston adds:—

"For instance, 'Piracy' is a named peril, but surely none will doubt that the exclusion of seizure excludes seizure by pirates. Similarly, the exclusion of seizure excludes barratrous seizure.

"The following language appears in the opinion of the Lord Chancellor in *Cory* v. *Burr* at 8 App. Cas. p. 397:

'Suppose the case of a belligerent capture: that belligerent capture is as much attributable to 'men-of-war' or to 'enemies,' 'takings at sea,' as any seizure by reason of barratry can be attributed to barratry—indeed, more directly and immediately . . . Then the argument, if it is sound as to barratry, would seem to be as sound as to 'men-of-war' and 'enemies' also, that because there is an express insurance against those things, therefore a 'capture or seizure' and consequently an attack by 'men-of-war' of by 'enemies' is to be taken out of the warranty . . . It is quite manifest that *the object of this warranty is, and must be to exclude such losses, otherwise covered by the policy, otherwise coming within the express terms of the policy, as arise out of and are losses occasioned by 'capture or seizure.'*

"In the case of *Kleinwort* v. *Shepard*, 1. El. & El. 447, 120 Reprint 977, the Court, construing the F. C. & S. Clause said:—

'If the crew, intending to turn pirates, were to murder the captain and run away with the ship, would not this be a loss by seizure?'

"Perhaps the idea was best expressed by Justice Strong of the Pennsylvania Supreme Court in *Fifield* v. *Insurance Company* (sic) 47, Pa. 166 (1864) when he said, p. 177:

'The underwriters undertook against such piracies only as were not captures'."

These extracts from Mr. Houston's letter give the substance of his observations, which he concludes with the comment that I owe it to my readers to clear up the basic misconception of the purpose and effect of the F. C. & S. Clause as revealed in my previous article.

Some Doubt

If I were convinced beyond all reasonable doubt that "seizure" in the F. C. & S. Clause excludes a barratrous seizure of the vessel by the master or crew, I should be only too happy to retract, and admit my error. As things are, I am by no means alone in the views I have expressed, and at least one prominent average adjuster has come to my support. On the other hand, another adjuster is quite definite that Mr. Houston is unquestionably right.

While it must readily be conceded that the Courts here have made it abundantly clear that "seizure" includes *all* forms of seizure, it is noticeable that in all the relevant cases the issue was concerned with seizure by *third parties* and not with *barratrous* seizure by the master or crew. It is true that in *Cory* v. *Burr*, to which reference had already been made, the seizure of the vessel resulted from the barratrous act of the master in smuggling goods into Spanish territory, but it was held that the proximate cause of the loss was *seizure*—excluded by the F. C. & S. Clause—and *not* the barratry of the master. If *barratry* had been held to be the *proximate* cause, is it likely that the result would have been the same?

According to Arnould (12th Ed.) Sect. 859, where goods were seized in consequence of the captain's barratrous breach of blockade, it was held that the foreign sentence by which they were condemned as enemy's property could not prevent the plaintiff from recovering as for a loss by "bar-

ratry"; for, "even if the sentence were conclusive of the fact of enemy's property, still it was by the barratrous act of the captain that the goods assumed that character." (*Goldschmidt* v. *Whitmore*, 1811.) It seems to me that if the policy did not contain an exclusion of capture or seizure, there would have been no point in bringing the case as clearly, the loss would have been recoverable as a loss by barratry. On the other hand, if the policy did incorporate such an exclusion then surely the case establishes my point.

It is suggested by Mr. Houston that, since "piracy" is an insured peril, and that no one would question that piratical seizure is not excluded by the F. C. & S. Clause, then likewise *barratrous* seizure must also be excluded. That is certainly fair comment, but pirates are outsiders and not members of the crew, and my distinction has been between third parties and the owners' own servants. In any case, if it was so obvious that seizure by pirates was automatically excluded by the operation of the F. C. & S. Clause, why did underwriters specifically include "piracy" as a "war" risk by transferring it to the F. C. & S. exclusions during the Spanish Civil War?

Not So Simple

Although the intention of a clause is not material if the words used do not admit of ambiguity, it is none the less interesting to note that, according to Arnould, the F. C. & S. Clause was introduced into the policy during the Napoleonic war, when almost all the ports of the Baltic were in a state of occasional hostility to this country, and the adventurous expeditions to those seas were undertaken without any fixed destinations. Thus it became frequent for underwriters to insert a stipulation that they should not be answerable for the risk of capture, seizure, or confiscation in the ship's port of discharge, or in port or ports generally. The intention was clear, therefore, and that was to exclude from the policy capture or seizure by hostile governments, factions, or

peoples, and certainly not to restrict the cover under the head of "barratry of the master or mariners."

If it is so patent that barratrous seizure is excluded by the F. C. & S. Clause it is astonishing that underwriters in this market have never adopted that line of defense. It is also rather singular that Mr. Houston should have been the only correspondent to take up the cudgels. I do not mean to imply by that that he is wrong in law—that would be presumptuous of me—but merely that the issue does not appear to be quite as simple as he would have it.

The Post Magazine & Insurance Monitor August 15, 1957

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Barratry and Seizure

From a more detailed account of the case to which I referred in my Notes for the 25th July, it appears that in the course of the United States District Court's judgment, the following statement was made by Chief Judge Thomsen:—

> "Could there be a seizure of a vessel by her master, officers or crew? In other words, could there be a *barratrous* seizure, or were the terms 'barratry' and 'seizure' mutually exclusive? In *Greene* v. *Pacific Mutual Insurance Company* (91 Mass. 217), it was held that the word 'seizure' cannot be applied to any barratrous act of the master. He has by law possession and control of the ship . . . He cannot be justly said to seize that which is already in his own keeping. The same is true to a certain extent of the mariners who have a qualified possession of the vessel . . . The word 'seizure' as applied to the contract of insurance, may be said to import the taking possession of a ship or vessel by *superior force, or by violence from without,*

and not a barratrous conversion of her by the officers and crew."

On the other hand, the report goes on, in *Kleinwort v. Shepard*, 1889 (one of the cases on which Mr. Houston relied in his criticism of my views), which involved a mutiny by coolie passengers, it was suggested that if the crew, intending to turn pirates, were to murder the master and run away with the ship, that might be a loss by seizure. *But the Judge said that he had found no case which had approved that dictum.*

If this report is accurate—and there is no reason to doubt it—it is a complete vindication of my argument.

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MARINE INSURANCE Page 803

Barratry and Seizure

(From our Marine Correspondence)

In my Notes of 13/6/57 I drew attention to a decision of a United States District Court to the effect that the seizure of a vessel by her crew amounted to "seizure" within the meaning of the policy and was therefore an excluded risk under the Free of Capture and Seizure Clause. It seemed to me, however, that from the facts of the case it was reasonable to conclude that the loss was clearly a case of "barratry of the master and mariners" and thus recoverable under the standard form of policy as a loss by *barratry* notwithstanding the F. C. & S. exclusions. Further observations on the case were made in articles under date of 25/7/57 and 15/8/57.

In point of fact, there were, altogether, seven vessels involved in separate suits but it was agreed to try the actions concurrently in the District Court. The District Judge held that six of the vessels were lost by barratry

of the master and awarded damages in the sum of $2,995,270.87, the face value of the policies, with interest at 3 per cent. from the date liability was denied to the date of the decree, and interest at 6 per cent. from the latter date until paid. As to the seventh vessel, it was adjudged that the seizure of the ship by her crew was excluded from the cover afforded by the policy. My comments were confined entirely to the ruling given in the case of this seventh vessel, the "Hai Hsuan."

In the meantime, the seven cases have been before the United States Court of Appeals. The ruling of this Court, recently announced, affirms the judgment of the District Court with respect to the first six vessels but has reversed the judgment in the "Hai Hsuan" case, holding that the seizure of the vessel was an act of *barratry* and therefore covered by the policy notwithstanding the F. C. and S. Clause exclusions.

The essence of the higher Court's findings is that to constitute a "seizure" within the meaning of the F. C. and S. Clause there must be a forcible taking of possession from *without*, which would obviously exclude a *barratrous* seizure, barratry being confined to acts of the *master and/or members of the crew*. This is absolutely in line with the views expressed in my previous articles and an answer to those who considered my reasoning faulty and misleading, the Court of Appeals being unanimous in its decision.

Judgment

Delivering the judgment of the Court, Circuit Judge Soper referred to the opinion of Chief Justice Bigelow in *Greene* v. *Pacific Mutual Life Insurance Company*, 91 Mass. 217 (1864). In that case the owner of a whaling ship recovered from the insurance company for a loss sustained when the ship was taken from the command of the officers and the possession of the owner by a mutinous crew. The principal question considered by the court was whether the insurers were liable for the loss under the clause covering

"barratry of master or mariners" or were exonerated from liability under the clause by which the vessel was warranted "free from loss or expense arising from capture, seizure or detention." Underwriters defended on the ground that the evidence showed a "seizure" of the vessel by the mutinous acts of the crew, and in discussing this question the Court said:

> "... Barratry is one of the enumerated perils against which the defendants insured the plaintiff. This is a generic term which includes many acts of various kinds and degrees. It comprehends any unlawful, fraudulent or dishonest act of the master or mariners, and every violation of duty by them arising from gross and culpable negligence contrary to their duty to the owner of the vessel, and which might work loss or injury to him in the course of the voyage insured. A mutiny of the crew and forcible dispossession by them of the master and other officers from the ship is only one form of barratry. Now it is obvious, in a practical point of view, that no reasons existed for exempting this particular mode of committing the act from the general risk of barratry which the underwriters assumed . . . Nor is it reasonable to suppose that the parties, if they contemplated such a special warranty against a particular form or mode of committing an act of barratry, would have expressed it in language which, as applied to the subject-matter, leaves this meaning, to say the least, exceedingly doubtful and ambiguous. This consideration is of itself quite decisive of the construction which it is our duty to put on the policy declared on. Inasmuch as barratry is one of the risks assumed by the insurers, unless particular acts are clearly excepted in terms which leave no doubt as to their meaning, the general words of the policy must have full operation.
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> "But we do not deem it necessary to put the decision of this point on so narrow a ground. Upon care-

ful consideration we are of opinion that the exception of a loss by seizure does not include the risk of mutiny of the mariners and the forcible taking of the ship from the control of the officers; or, in other words, that it does not properly exclude from the operation of the policy a loss by barratry. Certainly the word 'seizure' cannot be applied to any barratrous act of the master. He has by law possession and control of the ship. He may, it is true, take her out of her course, or convert her to his own use in violation or his duty to the owners. But he cannot be justly said to seize that which is already in his own keeping. The same is true to a certain extent, of the mariners. While in the discharge of their duty they have a qualified possession of the vessel. Subject to the order of the master, it is in their care and custody. If they violate their duty and disobey the master, displace him from command and assume entire control of the vessel, it is a breach of trust rather than a seizure (*Lawton* v. *Sun Insce. Co.*). It can be properly described only as barratry . . . *Indeed, the word 'seizure,' as applied to the contract of insurance, may be said to import the taking possession of a ship or vessel by superior force, or by violence from without, and not a barratrous conversion of her by the officers and crew, or either of them.* No adjudicated case can be found in which it has been interpreted to include an act of the latter character . . . The (policy) exemption is from liability for loss by reason of capture, seizure or detention. Capture and detention are both risks which can arise only from acts of persons having no connection with the ship, who take her out of the possession of the master and mariners forcibly, either without right or by the authority of law. The rule of interpretation, that words coupled together in the same sentence are to be understood and construed in *eodem sensu* warrants the conclusion that 'seizure' was intended to be understood as having reference to a similar class of

risks, and to exempt the insurers from liability for loss arising from a forcible taking of the vessel by others than the officers and crew . . ."

This decision, Circuit Judge Soper continued, had been repeatedly cited and the principles enunciated had been generally accepted by text-book writers on the subject of marine insurance. The Court of Appeals accepted this view of the law and agreed that if members of a crew violate their duty and disobey the master, displacing him from command and assuming entire control of the vessel, it was a breach of trust rather than a seizure.

"The Minden" Case Distinguished

For the respondent insurance company it was contended the closest case was *The Minden* (1942) A.C. 50, which concerned the action of a German master of a German vessel carrying British cargo at the beginning of World War II. Acting under orders of the German Government, the master scuttled the ship to prevent her capture by the British. The British court held that underwriters were liable under a cargo policy insuring against loss by "capture, seizure, arrest, restraint and detainments of all Kings, Princes and peoples." The respondents argued that the opinion of Lord Wright, characterising the action of the German master as a "seizure" of the British cargo, was unassailable authority for the proposition that a person in qualified possession of a thing, such as a master in charge of a ship, can "seize" it from the owner by merely changing the character of his possession.

In the view of the Court of Appeals, however, the decision in the case relied upon did not justify the conclusions drawn by respondents since it was directed to the relationship of the master to the owner *of the cargo*, which differed from his relationship of trust to the owner of the ship in that a breach of the latter amounts to a barratrous act within the coverage of the policy. There was no *barratry* in the case of *The Minden*.